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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Robert H. Jackson, Attorney General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on March 7, 1940.

OPINIONS BELOW

The opinion of the District Court (R. 1074–1092) is reported in 27 F. Supp. 44. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1118–1126) is reported in 109 F. (2d) 714.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 7, 1940 (R. 1126–1127). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an "enemy", as defined by that Act.

STATUTES INVOLVED

The pertinent portions of the Trading with the Enemy Act are set forth in the Appendix.

STATEMENT

The firm of Crossman & Sielcken was a partnership having its principal place of business in New York. It consisted of Sorenson, Nielsen, and Sielcken, all citizens of the United States (R. 808). The entire capital of the partnership belonged to Sielcken, and the articles of partnership provided that upon Sielcken's death the surviving partners should pay over to his executor all of the assets of the partnership (R. 807). The interests of Sorenson and Nielsen in the partnership were limited to

12½% each of the net profits (R. 60, 807). Sielcken died in Germany on October 8, 1917, after having resided there continuously since 1914 (R. 814).

The prior suit.—In 1927 Sorenson and Nielsen brought suit against the Alien Property Custodian in the United States District Court for the Southern District of New York under Section 9 (a) of the Trading with the Enemy Act (R. 318). The complaint alleged that a debt was due the partnership of Crossman & Sielcken by Zentral Einkaufs-Gesellschaft, m. b. H. (hereinafter referred to as "Z. E. G."), a German corporation acting as official purchasing agent for the Imperial German Government (R. 319–320). It was alleged that the debt was for certain cargoes consigned by Crossman & Sielcken to Z. E. G. at neutral ports during 1915, which had been seized and condemned by the British. The complaint declared that the Alien Property Custodian had in his possession certain assets of the Z. E. G. (R. 322), and that the recovery of the debt was sought out of those assets (R. 322–323). Sorenson and Nielsen alleged that they brought the suit as surviving partners pursuant to Section 61 of the Partnership Law of New York (R. 322).

Z. E. G. filed an answer alleging that no debt was owing to the partnership, first, because title did not pass until delivery of the cargoes at neutral ports (R. 327) and the cargoes had been seized before arrival at such ports, and second, because the non-

liability of Z. E. G. had been conclusively determined by arbitration in Germany (R. 330). In support of this second defense, Z. E. G. alleged that the partnership of Crossman & Sielcken had been dissolved by the outbreak of the war on April 6, 1917, by reason of the fact that Sielcken was then residing in Germany, and became an enemy (R. 329). The answer alleged that the claim in question thereupon passed to Sielcken, and upon his death to his German executors (R. 329–330). It was averred that the German executors had entered into an arbitration agreement with Z. E. G. (R. 330), and that the arbitrators had found that there was no liability on the part of Z. E. G. in respect of the seized shipments. The Alien Property Custodian answered, adopting the defenses of Z. E. G. and alleging generally that he was without knowledge of the facts alleged (R. 337–341).

The District Court held that the shipments were made pursuant to c. i. f. contracts and that the risk of loss therefore rested with the consignee. It further held that the partnership was not dissolved by the outbreak of war so that the claim against Z. E. G. did not pass to Sielcken before his death, and that his German executors, therefore, had no power to arbitrate the claim (R. 864–866). The District Court accordingly found that Z. E. G. was indebted to the partnership, and entered judgment against the Alien Property Custodian and the Treasurer of the United States in the sum of $716,-

160.37 (R. 352). This judgment was duly paid (R. 1071–1072).

The sole question litigated in the 1929 proceeding was whether any debt was owing from Z. E. G. No issue was made by the pleadings or raised at the trial as to whether the surviving partners were precluded from suing because Section 9 (a) of the Trading with the Enemy Act expressly limited suit to a person "not an enemy," and Sielcken, whose estate would be the sole beneficiary of any recovery, was an "enemy" as defined in the Act.[1] Z. E. G. did contend, in support of the authority of Sielcken's German executors to make a binding arbitration agreement, that Sielcken was an "enemy" under the Trading with the Enemy Act by virtue of his residence in Germany, and was by analogy an enemy within the operation of the common law rule that a partnership is dissolved upon a declaration of war if one of the members thereby becomes an enemy. The District Court, Judge Caffey presiding, held that Sielcken while an enemy as defined in the Act, did not become an enemy within the meaning of the dissolution doctrine, and that the claim therefore did not pass to

[1] Paragraph 2 of the complaint alleged that the *partnership* was neither an enemy nor an ally of an enemy within the meaning of the Act of October 6, 1917 (R. 319). The answer of Z. E. G. (R. 324–325) and of the Alien Property Custodian (R. 338) denied knowledge sufficient to form a belief in this respect.

Sielcken but remained a partnership asset.[2] The question was never mooted and Judge Caffey did not decide whether the court was without jurisdiction of the suit because Sielcken was admittedly

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[2] The discussion of this question at the trial appears at R. 851–857. Judge Caffey, in the course of a colloquy with counsel, said (R. 852–853):

> In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership. * * *
>
> I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provide in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.
>
> It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy.

In his memorandum opinion, Judge Caffey, after holding that the transaction between Crossman & Sielcken and Z. E. G. was a c. i. f. contract, disposed of the alleged dissolution of the partnership as follows (R. 865):

> I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914.

an "enemy" within the meaning of the Trading with the Enemy Act. Apparently it was assumed by all parties that the court did have jurisdiction.

The present suit. In 1938, the Attorney General of the United States, as successor to the Alien Property Custodian, moved to set aside the 1929 judgment on the ground that the District Court had been without jurisdiction. In support of the motion he pointed out that, in the prior suit, it clearly appeared that the estate of Sielcken was the sole owner of the claim, that Sielcken was an enemy under Section 2 of the Trading with the Enemy Act, and that the suit by Sorenson and Nielsen, as liquidating partners, was merely a suit for the benefit of Sielcken's estate. The Irving Trust Company, the American executor of Sielcken's estate, was permitted to intervene, and numerous documents and affidavits were filed in support of and in opposition to the motion.[3] The motion was

[3] The evidence adduced in support of the motion to set aside the judgment discloses substantial evidence of collusion and possible fraud. Thus it appears that Sorenson and Nielsen had no interest whatsoever in the claim, that they had been paid in full for their interest in the partnership profits; had executed releases to the executor; and had assigned any right thereto to the Irving Trust Company (R. 252–255). It appears that counsel for Sorenson and Nielsen had deliberately refrained from making the trust company, as executor, a party to the suit because he knew that it would be evident to the court that it lacked jurisdiction (R. 217, 218). And it further appears that the plaintiffs received nothing out of the amount awarded (R. 262, 267); that approximately one-half was paid to Z. E. G., the Ger-

heard before Judge Goddard, who concluded that no jurisdiction had existed to enter the 1929 judgment,[4] which he accordingly set aside. On appeal, the Circuit Court of Appeals for the Second Circuit reversed.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the prior judgment was *res judicata* on the question whether the estate of Sielcken was the beneficial owner of the claim sued on, and whether Sielcken was an "enemy" as defined in the Trading with the Enemy Act.

2. In holding that the prior judgment was *res judicata* on these questions even if they were not actually litigated in that suit.

---

man Government corporation which in no circumstances was entitled to recover any part of its property seized by the Alien Property Custodian (R. 223–228); that $50,000 of the amount recovered was paid to a German national, Theodor Wille (R. 223–228); and that the balance was retained by the respondent trust company, which had assented to this distribution (R. 228).

[4] He also said (R. 1088–1089): "It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate, although nominally between the plaintiffs, as alleged nonenemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of 'creating a case cognizable' under the Trading with the Enemy Act."

3. In holding that these questions were actually litigated in the prior suit.

4. In reversing the order of the District Judge setting aside the prior judgment.

REASONS FOR GRANTING THE WRIT

1. The original suit was brought under Section 9 (a) of the Trading with the Enemy Act, which provides that a person not an enemy may bring suit in a federal district court against the Alien Property Custodian to recover for a debt owed by an enemy whose property has been seized by the Custodian. Section 2 of the Act defines an enemy as a person of any nationality, resident within the territory of any nation with which the United States is at war. It is settled that a nominal plaintiff cannot maintain a suit under the Act where the real party in interest is an enemy.[5] Petitioner contended below, in support of the motion to set aside the judgment, that the former suit was brought by the individual respondents on behalf of the estate of Sielcken, and that Sielcken was a resident of Germany at the time of his death, and was, therefore, an enemy within the meaning of the Act. The court below held that since these questions, being jurisdictional, were necessarily be-

[5] *Stoehr* v. *Wallace*, 255 U. S. 239; *Schrijver* v. *Sutherland*, 19 F. (2d) 688 (App. D. C.); *Miller* v. *Schutte*, 287 Fed. 604, 607 (App. D. C.). Cf. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, 462; *Swiss National Insurance Co.* v. *Miller*, 267 U. S. 42, 44; *Sturchler* v. *Hicks*, 17 F. (2d) 321 (E. D. N. Y.).

fore the district court in the former suit, the judgment in that suit was *res judicata*. The decision is in conflict with the subsequent decision of this Court in *United States* v. *United States Fidelity and Guaranty Co.*, No. 569, this Term, decided March 25, 1940.

The court below relied upon *Stoll* v. *Gottlieb*, 305 U. S. 165, and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371. In the former case the Court simply announced the ordinary rule that a judgment is *res judicata* as to jurisdictional issues actually raised and litigated. In the latter case the Court held that a judgment is, in some circumstances at least,[6] *res judicata* as to the jurisdiction of the court to entertain the suit, even though the jurisdictional question was not raised. But in that case the jurisdictional question was not whether the United States had consented to be sued. And in *United States* v. *United States Fidelity and Guaranty Co., supra*, the Court held that a judgment on a cross-claim against the United States, entered in the absence of specific statutory consent, was void and subject to collateral attack. The Court said:

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial

[6] Compare *Kalb* v. *Feuerstein*, 308 U. S. 433.

power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body. *Chicot County Drainage District* v. *Baxter State Bank* is inapplicable where the issue is the waiver of immunity.

This decision reflects the familiar rule that the representatives of the Government cannot by their silence, or even acquiescence, confer on a court jurisdiction of a suit against the United States, if Congress has withheld consent to suit.[1] And this Court has repeatedly held that a suit against the Alien Property Custodian is, in substance, a suit against the United States to be maintained only as Congress has consented. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118.

2. The court below went on to say that the jurisdictional questions, that is the questions as to the residence of Sielcken and as to the interest of respondents in the claim, were not only necessarily present in the original suit but were actually raised and litigated there. And the court apparently assumed that if this was the case the former judgment was unquestionably *res judicata.*

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[1] *Case* v. *Terrell,* 11 Wall. 199, 202; *Carr* v. *United States,* 98 U. S. 433, 435–439; *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *Munro* v. *United States,* 303 U. S. 36, 41; *Minnesota* v. *United States,* 305 U. S. 382, 388–389.

The statement that these issues were actually raised and litigated in the original proceeding is, we think, wholly erroneous. As shown in the Statement, *supra,* pp. 3–7, it was unsuccessfully contended in the former proceeding that because Sielcken was an enemy under the Trading with the Enemy Act the partnership was, by the common law rule, dissolved upon the declaration of war.[8] But the question was not litigated whether, since Sielcken's estate was the real party in interest, the suit was within the statutory consent because Sielcken was an enemy under the statute.[9]

But, in any event, and assuming that these issues were actually litigated in the former proceeding, the decision of the court below that the former judgment is therefore *res judicata* is one of substantial importance which is in conflict with the decision of the Court of Appeals for the District of Columbia in *United States* v. *Ickes,* 84 F. (2d)

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[8] This contention was made in connection with the question as to the authority of Sielcken's German executors to arbitrate the claim against the Z. E. G.

[9] The sole basis for the statement of the court below that the jurisdictional issue was litigated is the allegation in the partnership's pleadings in the original suit that the *partnership* was not an enemy or ally of an enemy within the meaning of the Trading with the Enemy Act (R. 319). The defendants Z. E. G. and the Alien Property Custodian denied sufficient knowledge to form a belief as to this allegation; thereafter the jurisdictional objection was mentioned neither in the hearings nor in the memorandum of the trial judge (R. 324–325, 338).

257, and is of doubtful correctness under the decisions of this Court.

In the *Ickes* case a suit was instituted to compel the Secretary of the Interior to consider a certain claim and the Secretary answered that the claim had never been presented to him, presentation and rejection being prerequisite to any suit against him under the statute there involved. Later, however, the Secretary consented that a decree be entered against him for the issuance of a writ of mandamus. Thereafter, the Secretary moved to set aside the decree on the ground that the claim in question had never been presented to and considered by him. The Court of Appeals for the District of Columbia held that the former decree was not *res judicata* on that jurisdictional question and, accordingly, set aside the consent decree.

It is unquestionably true that a judgment is ordinarily *res judicata* as between private parties even as to jurisdictional issues, if they were actually raised and litigated. *Stoll* v. *Gottlieb, supra.* But attention has already been called to the principle that the legal representatives of the United States cannot enlarge a statutory consent to suit against it by their failure to object or even by their affirmative acquiescence. And no reason is perceived why the agents of the United States should have any greater power to increase its liability to suit by unsuccessfully urging an ob-

jection and then abandoning it, either expressly as in the *Ickes* case or simply by failing to appeal. In the *United States Fidelity and Guaranty Co.* case, although the jurisdictional issues had not in fact been litigated in the prior proceeding, the Court stated broadly that the failure of officials to seek review could not make a judgment *res judicata* on the question whether the United States had consented to the suit, and that the *Chicot County* case "is inapplicable where the issue is the waiver of immunity."

CONCLUSION

The decision below is incorrect. It decides questions of substantial general importance and is in conflict with a recent decision of this Court and with a decision of the Court of Appeals for the District of Columbia. It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY, 1940.

APPENDIX

The Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411 (U. S. C. A., Title 50, Appendix) provides in part:

> SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, * * *.
>
> SEC. 7 (c).
>
> * * * * * *
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.
>
> SEC. 9 (a). That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof

shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

SEC. 9 (f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

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